

ESTTA Tracking number: **ESTTA606363**

Filing date: **05/27/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding.	92057116
Applicant	Defendant Darryl D. Agler
Other Party	Plaintiff Westheimer Corporation
Have the parties held their discovery conference as required under Trademark Rules 2.120(a)(1) and (a)(2)?	Yes

Motion for Suspension in View of Civil Proceeding With Consent

The parties are engaged in a civil action which may have a bearing on this proceeding. Accordingly, Darryl D. Agler hereby requests suspension of this proceeding pending a final determination of the civil action. Trademark Rule 2.117.

Darryl D. Agler has secured the express consent of all other parties to this proceeding for the suspension and resetting of dates requested herein.

Darryl D. Agler has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Respectfully submitted,

/Louis T. Perry/

Louis T. Perry

tmindy@faegrebd.com, louis.perry@faegrebd.com, amie.peelecarter@faegrebd.com

ip@musicesq.com

05/27/2014

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re U.S. Trademark Registration No. 3,986,754
For the Mark: STRATOTONE
Registered on: June 28, 2011

WESTHEIMER CORPORATION)	
)	
Petitioner,)	Cancellation No.: 92057116
)	
v.)	
)	
DARRYL D. AGLER)	
)	
Registrant.)	

AGREED MOTION TO SUSPEND PROCEEDINGS FOR CIVIL ACTION

Registrant, DARRY D. AGLER, by and through his undersigned counsel and pursuant to 37 C.F.R. § 2.117 and TMBP 510.02(a), hereby requests that proceedings before this Board be suspended until final determination of a civil action now pending in the United States District Court for the Northern District of Indiana, and states:

1. On March 27, 2014, Registrant filed a civil action in the United States District Court for the Northern District of Indiana, *Darryl D. Agler v. Westheimer Corporation*, Case No. 1:14-cv-99 (the "Complaint"). See Complaint, attached hereto as Exhibit 1.
2. On May 27, 2014, Petitioner, WESTHEIMER CORPORATION, filed its answer and counterclaims to the Complaint (the "Answer"). See Answer, attached hereto as Exhibit 2.
3. The Answer contains counterclaims and affirmative defenses that rest upon the allegation that U.S. Reg. No. 3,986,754—the subject of this proceeding before the Board—was fraudulently obtained. Consequently, Petitioner has requested that the United States District Court for the North District of Indiana cancel U.S. Reg. No. 3,986,754.

4. The outcome of the federal court case, therefore, is likely to have a bearing on the case before the Board.

5. Registrant has previously moved for the suspension of this proceeding, but such motion was denied by the Interlocutory Attorney because the allegations in the Complaint did not overlap with the allegations contained in Petitioner's Petition for Cancellation. The Interlocutory Attorney, however, indicated in his ruling that "... the civil action may ultimately be shown to have a bearing on this proceeding once the issues therein, including any counterclaims, have been joined ..."

6. Registrant submits that the Answer contains allegations and requests for relief that will likely have a bearing on the case before the Board.

7. On May 21, 2014, the undersigned spoke with counsel for Petitioner. In that conversation, counsel for Petitioner expressed his agreement to this Motion.

Accordingly, Registrant respectfully requests that proceedings before this Board be suspended until final determination of the civil action.

Dated: May 27, 2014

Respectfully submitted,

Faegre Baker Daniels LLP

By: /Louis T. Perry/

Louis T. Perry
Amie Peele Carter
FAEGRE BAKER DANIELS LLP
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46239
Tel: (317) 237 1089
Fax: (317) 237 1000
Email: louis.perry@faegrebd.com

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent via U.S. Mail on May 27, 2014

to:

Ronald S. Bienstock
Brent Davis
Bienstock & Michael P.C.
411 Hackensack Avenue
Continental Plaza
7th Floor
Hackensack, New Jersey 07601

/Louis T. Perry/

EXHIBIT 1

4. Venue is properly founded in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c) because Agler resides in this District, may be found in this District, and a substantial part of the events giving rise to the claims in this action occurred within this District.

Parties

5. Agler is an individual residing at 5506 Quail Canyon Circle, Fort Wayne, Indiana 46835 and does business as The Stratotone Guitar Co.

6. Upon information and belief, Westheimer is an entity organized and existing under the laws of the State of Illinois, with its principal place of business located at 3451 West Commercial Avenue, Northbrook, Illinois 60062.

Allegations Applicable to All Counts

7. The following factual allegations are set forth for purposes of all legal counts alleged in this Complaint, *infra*.

8. Agler custom-manufactures high-quality guitars and sells them across the United States of America. Each of Agler's guitars is painstakingly hand-crafted from the wood of a customer's choosing and features vintage hardware and pick-ups.

9. Agler currently accepts orders for his guitars on his website at <stratotoneguitar.com> (the "Site"). A printout of the Site is attached hereto as Exhibit A.

10. Agler also regularly showcases and sells his guitars at vintage guitar shows across the nation.

11. Agler's guitars generally retail from \$1250 and upward.

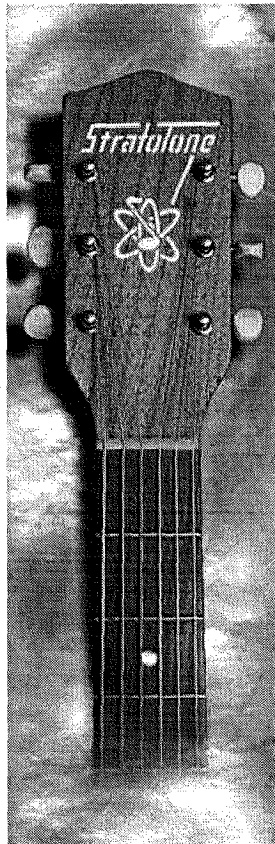
12. On March 7, 2006, Agler filed Application Ser. No. 78/831,179 (the "'179 Application") with the United States Patent and Trademark Office (the "PTO") for the mark STRATOTONE (the "STRATOTONE Mark") pursuant to 15 U.S.C. §1051(b). The

STRATOTONE Mark was identified in association with “musical instruments, namely, guitars” in International Class 15. A copy of the ‘179 Application is attached hereto as Exhibit B.

13. The ‘179 Application matured into U.S. Reg. No. 3,986,754 (“‘754 Registration”) on June 28, 2011. A copy of the ‘754 Registration is attached hereto as Exhibit C.

14. Since at least as early as January of 2007, Agler’s marketing and promotions in connection with his guitars have included the STRATOTONE Mark.

15. As pictured below, the STRATOTONE Mark also appears on what is commonly referred to as the “head” of Agler’s guitars.



16. At the National Association of Music Merchants (“NAMM”) show in 2010, Agler noticed Westheimer selling a mass-produced cheaper version of the same style of guitar under the STRATOTONE Mark at a much lower price point than Agler’s custom STRATOTONE

guitars, notwithstanding Agler's prior exclusive rights in the STRATOTONE Mark. Agler spoke to Westheimer personnel twice at the NAMM show, notifying them that Westheimer's products were infringing the STRATOTONE Mark. Agler was unable to sell any of his guitars at the 2010 NAMM show.

17. Since that time, Westheimer has flooded the market with lower quality, cheaper guitars that bear the STRATOTONE Mark. These inferior products retail between \$199.00 and \$399.00, and have destroyed the market for Agler's high-end STRATOTONE guitars.

18. On December 4, 2012 Westheimer filed Application Ser. No. 85/794,320 (the "320 Application") for the STRATOTONE Mark for use in association with "guitars" in International Class 15 pursuant to 15 U.S.C. §1051(a). In the '320 Application, Westheimer represented to the PTO that it had been using the STRATOTONE Mark in commerce since "00/00/2009" and that the STRATOTONE Mark was currently in use. A copy of the '320 Application is attached hereto as Exhibit D.

19. On March 26, 2013, the PTO refused to register the '320 Application unless Westheimer submitted a claim of ownership with respect to Agler's '754 Registration. A copy of this refusal is attached hereto Exhibit E.

20. Westheimer could not provide the PTO with a claim of ownership for the '754 Registration because it did not own the '754 Registration.

21. On April 25, 2013, Westheimer filed a petition to cancel the '754 Registration (the "Cancellation Petition") with the Trademark Trial and Appeal Board. The Cancellation Petition is currently pending under cancellation proceeding no. 92057116.

22. Westheimer is currently using the STRATOTONE Mark in commerce in association with guitars. A copy of a brochure featuring Westheimer's unauthorized use of the STRATOTONE Mark in association with guitars is attached as Exhibit F.

**COUNT I: FEDERAL UNFAIR COMPETITION AND FALSE DESIGNATION OF
ORIGIN**

(15 U.S.C. § 1125(a))

23. Agler reincorporates and realleges paragraphs 1 through 22 as though fully set forth herein.

24. Westheimer's use in commerce of the STRATOTONE Mark has caused and will continue to cause consumers to believe, contrary to fact, that the guitars it provides are sponsored, licensed and/or otherwise approved by, or are in some way connected to or affiliated with Agler.

25. Westheimer's use in commerce of the STRATOTONE Mark already has and continues to cause mistake, deception, and consumer confusion.

26. Westheimer's use of the STRATOTONE Mark is likely to cause initial interest confusion among the general public.

27. Westheimer had actual and constructive knowledge of Agler's prior rights in the STRATOTONE Mark when it began using the STRATOTONE Mark in commerce.

28. Westheimer had actual and constructive knowledge of the previously-existing '179 Application for the STRATOTONE Mark when it began using the STRATOTONE Mark in commerce.

29. The foregoing actions of Westheimer constitute unfair competition and false designation of origin in violation of 15 U.S.C. § 1125(a), and, on information and belief, have been knowing, intentional, deliberate, willful, malicious, and in disregard of Agler's rights.

30. Westheimer has unfairly profited from the actions alleged.

31. By reason of foregoing knowing, intentional, deliberate, willful, and malicious actions, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate.

32. Westheimer's activities have irreparably harmed and, if not enjoined, will continue to irreparably harm, the general public who has an interest in being free from confusion, mistake and deception.

33. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate it for injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief pursuant to 15 U.S.C. § 1116.

34. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts and pursuant to 15 U.S.C. § 1117, Agler is entitled to (i) Westheimer's profits; (ii) damages (and to have those damages trebled); and (iii) the costs of this action.

35. This is an exceptional case making Agler eligible for an award of attorneys' fees under 15 U.S.C. § 1117.

COUNT II: FEDERAL TRADEMARK INFRINGEMENT

(15 U.S.C. § 1114)

36. Agler reincorporates and realleges paragraphs 1 through 35 as though fully set forth herein.

37. Westheimer's use in commerce of the STRATOTONE Mark already has and continues to cause mistake, deception, consumer confusion.

38. Westheimer's use of the STRATOTONE Mark is likely to cause initial interest confusion among the general public.

39. The above-described acts of Westheimer constitute trademark infringement in violation of 15 U.S.C. § 1114(1), and, on information and belief, have been knowing, intentional, deliberate, willful, malicious, and intended to cause confusion or mistake, or to deceive, and in disregard of Agler's rights.

40. Westheimer has unfairly profited from the infringing actions alleged.

41. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate.

42. Westheimer's willful and intentional activities have irreparably harmed and, if not enjoined, will continue to irreparably harm, Agler.

43. Westheimer's willful and intentional activities have irreparably harmed and, if not enjoined, will continue to irreparably harm, the general public who has an interest in being free from confusion, mistake and deception.

44. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

45. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts and pursuant to 15 U.S.C. § 1117, Agler is entitled to (i) Westheimer's profits; (ii) damages (and to have those damages trebled); and (iii) the costs of this action.

46. This is an exceptional case making Agler eligible for an award of attorneys' fees under 15 U.S.C. § 1117.

COUNT III: FEDERAL TRADEMARK COUNTERFEITING

(15 U.S.C. § 1114)

47. Agler reincorporates and realleges paragraphs 1 through 46 as though fully set forth herein.

48. Without authorization, Westheimer used and uses in commerce a spurious designation identical to the federally registered STRATOTONE Mark in connection with the sale, offering for sale, distribution, and advertising of guitars, which goods are covered by the '754 Registration.

49. Westheimer's unauthorized use of the federally registered STRATOTONE Mark in connection with guitars has and will continue to cause consumers to believe that Westheimer's guitars originate from or are otherwise controlled by Agler and/or that Westheimer has Agler's authorization to use the federally registered STRATOTONE Mark in connection with guitars.

50. Westheimer's unauthorized use of the federally registered STRATOTONE Mark in connection with guitars is likely to cause and has caused confusion, mistake, or deception, including as to the origin, connection or association of Agler with Westheimer's guitars.

51. Westheimer's use of the federally registered STRATOTONE Mark in connection with guitars as described in this Complaint constitutes counterfeiting within the meaning of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

52. Westheimer's acts are knowing, intentional, deliberate, willful, and malicious.

53. By reason of the foregoing, Westheimer is liable to Agler for (a) statutory damages in an amount of up to \$2,000,000 for each counterfeited mark, as provided by 15 U.S.C. § 1117(c) of the Lanham Act, or, at Agler's election, an amount representing three (3) times Westheimer's illicit profits; and (b) reasonable attorneys' fees and pre-judgment interest pursuant to 15 U.S.C. § 1117(b).

**COUNT IV: COMMON LAW UNFAIR COMPETITION
AND TRADEMARK INFRINGEMENT**

54. Agler reincorporates and realleges paragraphs 1 through 53 as though fully set forth herein.

55. Westheimer's use in commerce of the STRATOTONE Mark in connection with guitars is likely to cause consumer confusion or mistake to deceive as to the source of Westheimer's goods.

56. Westheimer's conduct constitutes trademark infringement and unfair competition under the common law of the State of Indiana, entitling Agler to relief.

57. Westheimer has unfairly profited from the actions alleged herein.

58. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious actions described above, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate and has suffered irreparable harm.

59. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

COUNT V: UNJUST ENRICHMENT

60. Agler reincorporates and realleges paragraphs 1 through 59 as though fully set forth herein.

61. At the expense of and detriment to and without the prior express or implied authorization of Agler, Westheimer has been unjustly enriched through Westheimer's knowing, intentional, deliberate, willful, and malicious use of the STRATOTONE Mark.

62. By reason of Westheimer's actions described above, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate and has suffered irreparable harm.

63. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

COUNT VI: CONVERSION

(Ind. Code § 35-43-4-3)

64. Agler reincorporates and realleges paragraphs 1 through 63 as though fully set forth herein.

65. By engaging in the knowing, intentional, deliberate, willful, and malicious actions described above, Westheimer has exerted unauthorized control over the STRATOTONE Mark with the intent to deprive Agler of its benefit.

66. Westheimer has therefore committed conversion as defined under Ind. Code § 35-43-4-3.

67. Westheimer's conversion of the STRATOTONE Mark has proximately caused Agler to suffer damages in an amount as yet to be ascertained but which continues to accrue and accumulate and irreparable harm.

68. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

COUNT VII: DECEPTION

(Ind. Code § 35-43-5-3(a)(6))

69. Agler reincorporates and realleges paragraphs 1 through 68 as though fully set forth herein.

70. By engaging in the knowing, intentional, deliberate, willful, and malicious actions described above, Westheimer has disseminated to the public information that Westheimer knows is false, misleading, or deceptive, with the intent to promote Westheimer's business and/or commercial interests.

71. Westheimer has therefore committed deception under I.C. § 35-43-5-3(a)(6).

72. Westheimer's deception has proximately caused Agler to suffer damages in an amount as yet to be ascertained but which continues to accrue and accumulate and irreparable harm.

73. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

COUNT VIII: INDIANA CRIME VICTIM'S RELIEF ACT

74. Agler reincorporates and realleges paragraphs 1 through 73 as though fully set forth herein.

75. Under the Indiana Crime Victims' Act (I.C. § 35-24-3-1), a person that suffers pecuniary loss as a result of the violation of I.C. § 35-43 *et seq.*, may bring a civil action against the person who caused the loss for treble damages, costs of the action, and reasonable attorneys' fees.

76. Westheimer has violated Ind. Code. § 35-43 through knowing, intentional, deliberate, willful, and malicious commission of (i) conversion under Ind. Code § 35-43-4-3 and (ii) deception under Ind. Code. § 35-43-5-3.

77. Agler is the victim of Westheimer's knowing, intentional, deliberate, willful, and malicious criminal actions, and, as a result, has suffered actual pecuniary damages in an amount as yet to be ascertained but which continue to accrue and accumulate.

78. Agler is accordingly entitled to an award of those actual damages as well as statutory treble damages, corrective advertising damages, costs, and reasonable attorneys' fees.

DEMAND FOR JURY TRIAL

Agler hereby respectfully requests that all issues raised by this Complaint be tried by jury.

PRAYER FOR RELIEF

WHEREFORE, Darryl D. Agler, by counsel, hereby requests that this Court enter an order:

(a) enjoining Westheimer from (i) using the STRATOTONE Mark or any other name, word, mark, or designation confusingly similar to the STRATOTONE Mark in connection with guitars and similar products; (ii) applying for registration of the STRATOTONE Mark or any other name, word, mark, or designation confusingly similar to the STRATOTONE Mark in connection with guitars and similar products; and (iii) continuing to prosecute the '320 Application.

(b) requiring Westheimer to withdraw that Cancellation Petition with prejudice and allow the '320 Application to expire;

(c) requiring Westheimer to provide an accounting of all gains, profits, savings and advantages realized by it from the unauthorized use of the STRATOTONE Mark.

(d) requiring Westheimer to surrender any and all merchandise, design, plans, and marketing materials featuring the STRATOTONE Mark;

(e) awarding Agler all damages (including treble damages), costs, disbursements, expenses, and attorneys' fees owed to him pursuant to the Lanham Act and Indiana common and statutory law by reason of Westheimer's willful infringement, counterfeiting, and conversion of the STRATOTONE Mark in connection with guitars;

(f) declaring that this is an exceptional case under 15 U.S.C. § 1117 due to Westheimer's knowing, intentional, deliberate, willful, and malicious acts of trademark infringement and counterfeiting and awarding Agler his reasonable attorneys' fees; and

(g) all other just and proper relief to which Agler is entitled.

Respectfully submitted,

Dated: March 27, 2014

/Louis T. Perry/

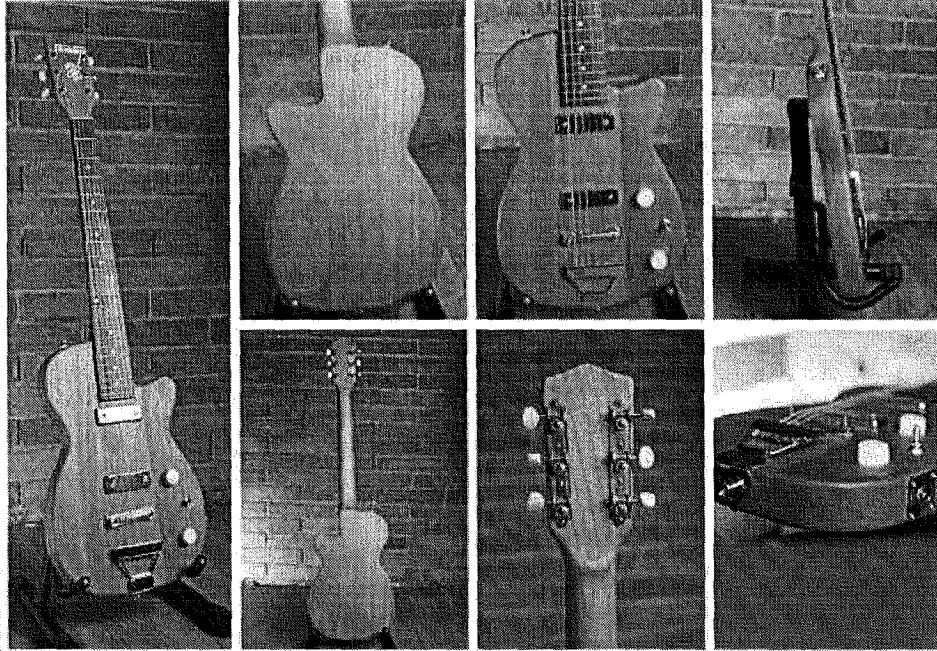
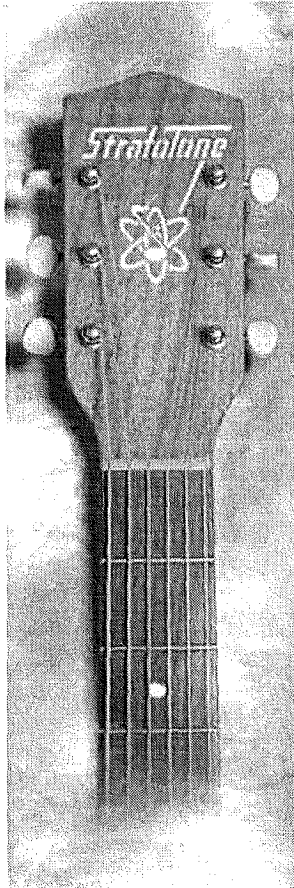
Louis T. Perry (#25736-49)
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amie.peeleccarter@FaegreBD.com

Complaint

EXHIBIT A



The STRATOTONE Guitar Co. is offering "Old School, Hand-Built", neck-through construction "Stratotone" guitars. Made with *Vintage DeArmond Pickups* and *Vintage Stratotone Hardware*. Our guitars are hand-built in the USA with a chunky 1950's neck profile and your choice of wood. We can use Poplar like an original 1950's Stratotone, Mahogany, Curly Maple, or any wood of your choosing.



Contact Us for Pricing!

Stratotone Guitar Company is the owner and originator of the web site content. This site and the imaging therein was created by CHSDesign. Information in this document is subject to change without notice. Comments, questions or problems regarding this web site's functionality should be directed to the Webmaster.
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Complaint

EXHIBIT B

PTO Form 1678 (Rev. 8/2005)
 CME No. 0651-0009 (Exp. 8/2009)

Trademark/Service Mark Application, Principal Register

Serial Number: 78831179

Filing Date: 03/07/2006

The table below presents the data as entered.

Input Field	Entered
MARK SECTION	
MARK	<u>Stratotone</u>
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	Stratotone
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
OWNER SECTION	
NAME	Agler, Darryl D.
STREET	1910 Spy Run Avenue
CITY	Fort Wayne
STATE	Indiana
ZIP/POSTAL CODE	46805
COUNTRY	United States
PHONE	260/804-0424
FAX	260/492-4446
EMAIL	dagler2@comcast.net
AUTHORIZED EMAIL COMMUNICATION	Yes
LEGAL ENTITY SECTION	
TYPE	INDIVIDUAL
COUNTRY OF CITIZENSHIP	United States
GOODS AND/OR SERVICES SECTION	

DESCRIPTION	Musical Instrument (guitar)
FILING BASIS	Section 1(b)
SIGNATURE SECTION	
SIGNATURE	/darryl agler/
SIGNATORY NAME	Darryl Agler
SIGNATORY DATE	03/07/2006
SIGNATORY POSITION	Owner
PAYMENT SECTION	
NUMBER OF CLASSES	1
NUMBER OF CLASSES PAID	1
SUBTOTAL AMOUNT	325
TOTAL AMOUNT	325
PAYMENT METHOD	CC
CORRESPONDENCE SECTION	
NAME	Agler, Darryl D.
STREET	1910 Spy Run Avenue
CITY	Fort Wayne
STATE	Indiana
ZIP/POSTAL CODE	46805
COUNTRY	United States
EMAIL	dagler2@comcast.net
AUTHORIZED EMAIL COMMUNICATION	Yes
FILING INFORMATION	
SUBMIT DATE	Tue Mar 07 15:19:35 EST 2006
TEAS STAMP	USPTO/BAS-71127842-200603 07151935964648-78831179-2 001aee6ca2f15c1bc0f15e86a 9872c8-CC-139-20060307150 740730465

PTO Form 1473 (Rev. 04/2005)
CME No. 0851-0009 (Exp. 03/31/2009)

Trademark/Service Mark Application, Principal Register

Serial Number: 78831179

Filing Date: 03/07/2006

To the Commissioner for Trademarks:

MARK: (Standard Characters, see mark)

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The literal element of the mark consists of Stratotone.

The applicant, Darryl D. Agler, a citizen of United States, residing at 1910 Spy Run Avenue, Fort Wayne, Indiana, United States, 46805, requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.

Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).

International Class _____: Musical Instrument (guitar)

The USPTO is authorized to communicate with the applicant or its representative at the following email address: dagler2@comcast.net.

A fee payment in the amount of \$325 will be submitted with the application, representing payment for 1 class(es).

Declaration

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /darryl agler/ Date: 03/07/2006
Signatory's Name: Darryl Agler
Signatory's Position: Owner

Mailing Address:

Agler, Darryl D.
1910 Spy Run Avenue
Fort Wayne, Indiana 46805

RAM Sale Number: 139
RAM Accounting Date: 03/08/2006

Serial Number: 78831179
Internet Transmission Date: Tue Mar 07 15:19:35 EST 2006
TEAS Stamp: USPTO/BAS-71127842-20060307151935964648-
78831179-2001aee6ca2f15c1bc0f15e86a9872c
8-CC-139-20060307150740730465

Stratotone

Complaint

EXHIBIT C

United States of America

United States Patent and Trademark Office

Stratotone

Reg. No. 3,986,754

Registered June 28, 2011

Int. Cl.: 15

TRADEMARK

PRINCIPAL REGISTER

AGLER, DARRYL D. (UNITED STATES INDIVIDUAL)
1910 SPY RUN AVENUE
FORT WAYNE, IN 46805

FOR: MUSICAL INSTRUMENTS, NAMELY, GUITARS, IN CLASS 15 (U.S. CLS. 2, 21 AND 36).

FIRST USE 1-0-2010; IN COMMERCE 1-0-2010.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 78-831,179, FILED 3-7-2006.

BILL DAWE, EXAMINING ATTORNEY



David J. Kappas

Director of the United States Patent and Trademark Office

Complaint

EXHIBIT D

PTO Form 1478 (Rev. 8/2006)
OMB No. 0651-0069 (E.g. 12/31/2014)

Trademark/Service Mark Application, Principal Register

Serial Number: 85794320

Filing Date: 12/04/2012

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85794320
MARK INFORMATION	
*MARK	STRATOTONE
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	STRATOTONE
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
REGISTER	Principal
APPLICANT INFORMATION	
*OWNER OF MARK	Westheimer Corporation
*STREET	3451 West Commercial Avenue
*CITY	Northbrook
*STATE (Required for U.S. applicants)	Illinois
*COUNTRY	United States
*ZIP/POSTAL CODE (Required for U.S. applicants only)	60062
LEGAL ENTITY INFORMATION	
TYPE	corporation
STATE/COUNTRY OF INCORPORATION	Illinois
GOODS AND/OR SERVICES AND BASIS INFORMATION	
INTERNATIONAL CLASS	015
*IDENTIFICATION	Guitars

FILING BASIS	SECTION 1(a)
FIRST USE ANYWHERE DATE	At least as early as 00/00/2009
FIRST USE IN COMMERCE DATE	At least as early as 00/00/2009
SPECIMEN FILE NAME(S)	\\TICRS\EXPORT16\IMAGEOUT 16\857\943\85794320\xml1\ APP0003.JPG
SPECIMEN DESCRIPTION	The specimen consists of a photographic image of Applicant's goods.
ATTORNEY INFORMATION	
NAME	Ronald S. Bienstock
STREET	411 Hackensack Ave.
CITY	Hackensack
STATE	New Jersey
COUNTRY	United States
ZIP/POSTAL CODE	07601
OTHER APPOINTED ATTORNEY	Tiffany Rex
CORRESPONDENCE INFORMATION	
NAME	Ronald S. Bienstock
STREET	411 Hackensack Ave.
CITY	Hackensack
STATE	New Jersey
COUNTRY	United States
ZIP/POSTAL CODE	07601
FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	325
*TOTAL FEE DUE	325
*TOTAL FEE PAID	325
SIGNATURE INFORMATION	
SIGNATURE	/thesuit/
SIGNATORY'S NAME	Ronald S. Bienstock
SIGNATORY'S POSITION	Attorney of Record, NJ BAR

DATE SIGNED

12/04/2012

PTO Form 1478 (Rev. 5/2006)
OMB No. 0391-0009 (Exp. 12/31/2014)

Trademark/Service Mark Application, Principal Register

Serial Number: 85794320

Filing Date: 12/04/2012

To the Commissioner for Trademarks:

MARK: STRATOTONE (Standard Characters, see mark)

The literal element of the mark consists of STRATOTONE.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Westheimer Corporation, a corporation of Illinois, having an address of
3451 West Commercial Avenue
Northbrook, Illinois 60062
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

International Class 015: Guitars

In International Class 015, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 00/00/2009, and first used in commerce at least as early as 00/00/2009, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) The specimen consists of a photographic image of Applicant's goods..

Specimen File1

The applicant's current Attorney Information:

Ronald S. Bienstock and Tiffany Rex
411 Hackensack Ave.
Hackensack, New Jersey 07601
United States

The applicant's current Correspondence Information:

Ronald S. Bienstock
411 Hackensack Ave.
Hackensack, New Jersey 07601

A fee payment in the amount of \$325 has been submitted with the application, representing payment for 1

class(es).

Declaration

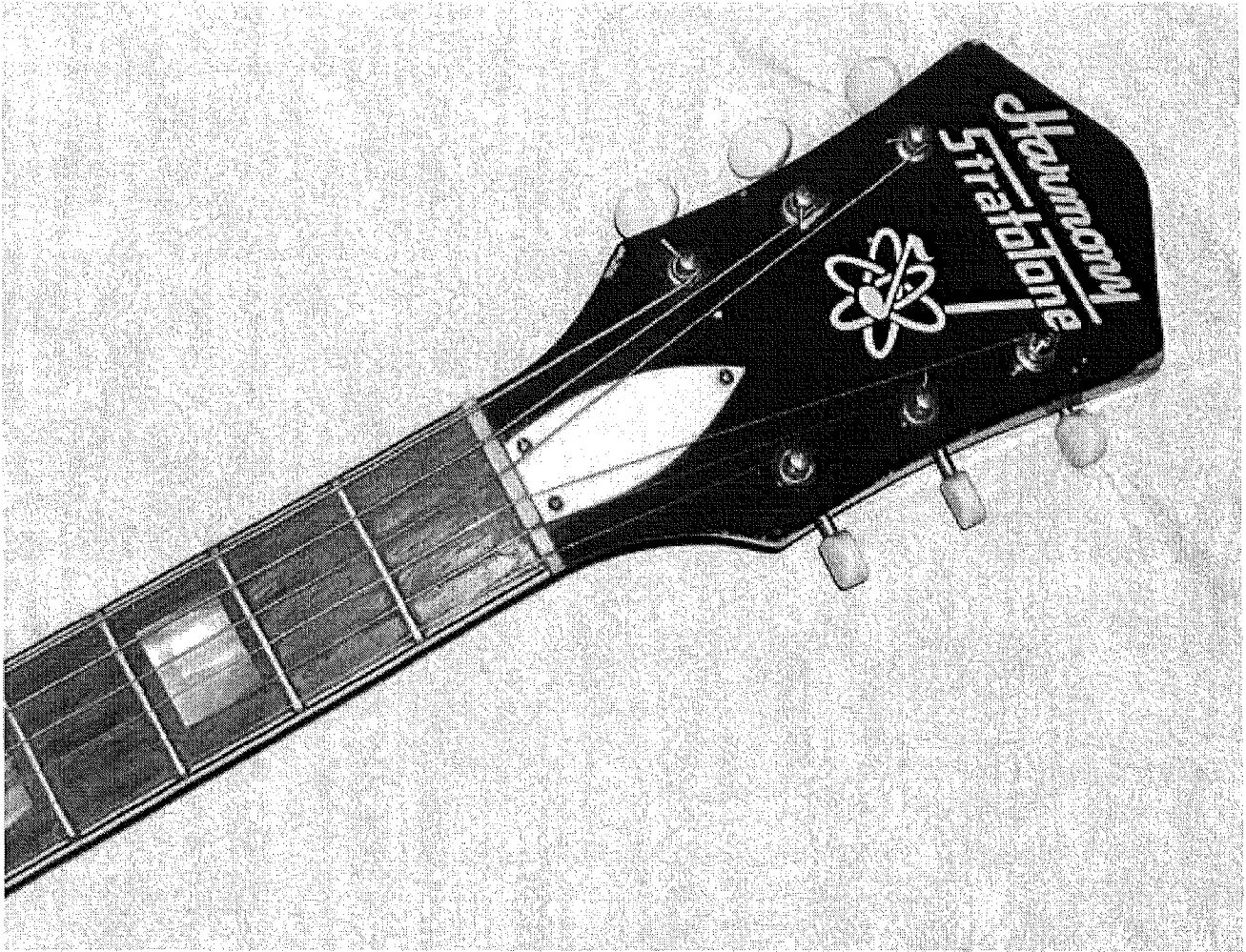
The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Declaration Signature

Signature: /thesuit/ Date: 12/04/2012
Signatory's Name: Ronald S. Bienstock
Signatory's Position: Attorney of Record, NJ BAR
RAM Sale Number: 3328
RAM Accounting Date: 12/05/2012

Serial Number: 85794320
Internet Transmission Date: Tue Dec 04 16:08:02 EST 2012
TEAS Stamp: USPTO/BAS-209.178.195.122-20121204160802
030313-85794320-490c4845df92f7565e6228c1
542f7f1b0ab-CC-3328-20121204155142045648

STRATOTONE



Complaint

EXHIBIT E

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

U.S. APPLICATION SERIAL NO. 85794320

MARK: STRATOTONE

85794320

CORRESPONDENT ADDRESS:

RONALD S. BIENSTOCK
411 HACKENSACK AVE
HACKENSACK, NJ 07601-6328

CLICK HERE TO RESPOND TO THIS LETTER
http://www.uspto.gov/trademarks/teas/response_forms.jsp

APPLICANT: Westheimer Corporation

CORRESPONDENT'S REFERENCE/DOCKET NO.:

N/A

CORRESPONDENT E-MAIL ADDRESS:

OFFICE ACTION

STRICT DEADLINE TO RESPOND TO THIS LETTER

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER **WITHIN 6 MONTHS** OF THE ISSUE/MAILING DATE BELOW.

ISSUE/MAILING DATE:

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issue(s) below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62(a), 2.65(a); TMEP §§711, 718.03.

The trademark examining attorney has searched the Office's database of registered and pending marks and has found no conflicting marks that would bar registration under Trademark Act Section 2(d). TMEP §704.02; *see* 15 U.S.C. §1052(d).

The applicant, however, must respond to the following additional requirement(s).

Applicant is encouraged to telephone the assigned trademark examining attorney to resolve the issues raised in this Office action.

Ownership of Prior Registration

An assignment is of record for Registration No. 3986754, therefore, applicant must submit for the application record a claim of ownership of this registration. See 37 C.F.R. §2.36; TMEP §812. See the attached copy of the registration. See TMEP §812.

Applicant may use the following format to claim ownership of the registration:

Applicant is the owner of U.S. Registration No. 3986754.

If applicant has questions about its application or needs assistance in responding to this Office action, please telephone the assigned trademark examining attorney directly at the number below.

/Regina C. Hines, Esq./
Regina.Hines@uspto.gov
Trademarks LO 114
571-272-9451
571-273-9451

TO RESPOND TO THIS LETTER: Go to http://www.uspto.gov/trademarks/teas/response_forms.jsp. Please wait 48-72 hours from the issue/ mailing date before using the Trademark Electronic Application System (TEAS), to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned trademark examining attorney. **E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.**

All informal e-mail communications relevant to this application will be placed in the official application record.

WHO MUST SIGN THE RESPONSE: It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

PERIODICALLY CHECK THE STATUS OF THE APPLICATION: To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at TrademarkAssistanceCenter@uspto.gov or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS: Use the TEAS form at
<http://www.uspto.gov/trademarks/teas/correspondence.isp>.

Print: Mar 28, 2013

78831179

DESIGN MARK

Serial Number

78831179

Status

REGISTERED

Word Mark

STRATOTONE

Standard Character Mark

Yes

Registration Number

3986754

Date Registered

2011/06/28

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(4) STANDARD CHARACTER MARK

Owner

Agler, Darryl D. INDIVIDUAL UNITED STATES 1910 Spy Run Avenue Fort Wayne INDIANA 46805

Goods/Services

Class Status -- ACTIVE. IC 015. US 002 021 036. G & S: Musical Instruments, namely, guitars. First Use: 2010/01/00. First Use In Commerce: 2010/01/00.

Filing Date

2006/03/07

Examining Attorney

DAWE, BILL

Attorney of Record

Gregory S. Cooper

Stratotone

Complaint

EXHIBIT F

Harmony

H49 "Jupiter-Stratotone"

BODY: Spruce Top/ Maple

NECK: Maple

FINGERBOARD: Rosewood

PICKUP: Harmony Gold Foil

CONTROLS: 2 Volume, 2 Tone, 1 Blend, 3-Way Selector

BRIDGE: Floating Adjustable Wood

FRETS & SCALE: 20F, 24 ¹/₈

MACHINE HEAD: Kluson Tuners

HARDWARE: Chrome

COLOR: Natural



TO ORDER:

Westheimer Corporation

3451 Commercial Ave, Northbrook, IL 60062-1818 | 847.498.9850 | sales@westheimercorp.com

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Darryl D. Agler

DEFENDANTS

Westheimer Corporation

(b) County of Residence of First Listed Plaintiff Allen
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)
Louis T. Perry, Faegre Baker Daniels LLP
300 N. Meridian St., Suite 2700, Indianapolis, IN 46204
(317) 237-0300

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat. TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
			IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 USC 1051 et seq. Lanham Act

Brief description of cause:

Complaint for trademark infringement

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

03/27/2014

SIGNATURE OF ATTORNEY OF RECORD

/s/ Louis T. Perry

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. (a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below:
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. **Origin.** Place an "X" in one of the six boxes:
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

DARRYL D. AGLER,)	
)	
Plaintiff,)	
)	Case No. 1:14-cv-99
v.)	
)	
WESTHEIMER CORPORATION,)	
)	
Defendant.)	

ANSWER AND COUNTERCLAIMS

Defendant, Westheimer Corporation, by counsel, and for its Answer to plaintiff's Complaint alleges and states as follows:

Nature of the Action

1. This is an action for trademark infringement, counterfeiting, unfair competition, and false designation of origin arising under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, and the statutes and common law of the State of Indiana.

ANSWER: Defendant admits that Plaintiff has brought this action for trademark infringement, counterfeiting, unfair competition and false designation of origin under the Lanham Act, 15 U.S.C. sec 1051 *et seq.*, and the statutes and common law of the State of Indiana.

Jurisdiction and Venue

2. Jurisdiction over the parties and subject matter of this action is proper in this Court pursuant to 15 U.S.C. § 1121 (actions arising under the Lanham Act), 28 U.S.C. § 1331 (actions under the laws of the United States), 28 U.S.C. § 1332(a) (diversity of citizenship between the parties), and 28 U.S.C. § 1338(a) (actions arising under an Act of Congress relating to, among other things, trademarks). This Court has supplemental jurisdiction over the claims in this Complaint that arise under state statutory and common law pursuant to 28 U.S.C. § 1367(a).

ANSWER: Paragraph 2 contains statements of law to which no response is required. To

the extent that Paragraph 2 contains assertions of fact, Defendant admits that this Court has subject matter jurisdiction of the Lanham Act claims contained in the Complaint and supplemental jurisdiction over the state law claims. Defendant denies that this Court has jurisdiction under 28 U.S.C. sec 1332(a).

3. This Court has personal jurisdiction over Westheimer because Westheimer does business in the State of Indiana.

ANSWER: Defendant admits the allegations contained in Paragraph 3 of the Complaint.

4. Venue is properly founded in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c) because Agler resides in this District, may be found in this District, and a substantial part of the events giving rise to the claims in this action occurred within this District.

ANSWER: Defendant is presently without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4 of the Complaint, and on that basis denies the same.

Parties

5. Agler is an individual residing at 5506 Quail Canyon Circle, Fort Wayne, Indiana 46835 and does business as The Stratotone Guitar Co.

ANSWER: Defendant is presently without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5 of the Complaint, and on that basis denies the same.

6. Upon information and belief, Westheimer is an entity organized and existing under the laws of the State of Illinois, with its principal place of business located at 3451 West Commercial Avenue, Northbrook, Illinois 60062.

ANSWER: Defendant admits the allegations contained in Paragraph 6 of the Complaint.

Allegations Applicable to All Counts

7. The following factual allegations are set forth for purposes of all legal counts alleged in this Complaint, *infra*.

ANSWER: Paragraph 7 contains statements of law to which no response is required.

8. Agler custom-manufactures high-quality guitars and sells them across the United States of America. Each of Agler's guitars is painstakingly hand-crafted from the wood of a customer's choosing and features vintage hardware and pick-ups.

ANSWER: Defendant denies the allegations contained in Paragraph 8 of the Complaint.

9. Agler currently accepts orders for his guitars on his website at <stratotoneguitar.com> (the "Site"). A printout of the Site is attached hereto as Exhibit A.

ANSWER: Defendant is presently without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9 of the Complaint, and on that basis denies the same.

10. Agler also regularly showcases and sells his guitars at vintage guitar shows across the nation.

ANSWER: Defendant is presently without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 10 of the Complaint, and on that basis denies the same.

11. Agler's guitars generally retail from \$1250 and upward.

ANSWER: Defendant is presently without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11 of the Complaint, and on that basis denies the same.

12. On March 7, 2006, Agler filed Application Ser. No. 78/831,179 (the "'179 Application") with the United States Patent and Trademark Office (the "PTO") for the mark

case 1:14-cv-00099-JD-RBC document 10 filed 05/27/14 page 4 of 24
STRATOTONE (the "STRATOTONE Mark") pursuant to 15 U.S.C. §1051(b). The
STRATOTONE Mark was identified in association with "musical instruments, namely, guitars"
in International Class 15. A copy of the '179 Application is attached hereto as Exhibit B.

ANSWER: Defendant admits the allegations contained in Paragraph 12 of the Complaint.

13. The '179 Application matured into U.S. Reg. No. 3,986,754 ("754 Registration")
on June 28, 2011. A copy of the '754 Registration is attached hereto as Exhibit C.

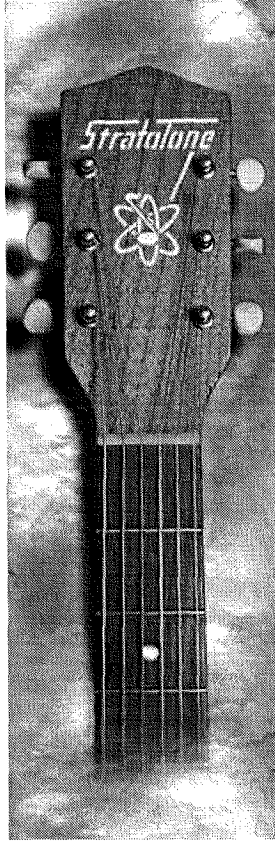
ANSWER: Defendant denies the allegations contained in Paragraph 13 of the Complaint.

14. Since at least as early as January of 2007, Agler's marketing and promotions in
connection with his guitars have included the STRATOTONE Mark.

ANSWER: Defendant is presently without knowledge or information sufficient to form a
belief as to the allegations contained in paragraph 14 of the Complaint, and on that basis denies
the same.

15. As pictured below, the STRATOTONE Mark also appears on what is commonly
referred to as the "head" of Agler's guitars.

ANSWER: Defendant denies that the headstock of a guitar is commonly referred to as the
"head." Defendant is presently without knowledge or information sufficient to form a belief as to
the remaining allegations contained in paragraph 15 of the Complaint, and on that basis denies the
same.



16. At the National Association of Music Merchants (“NAMM”) show in 2010, Agler noticed Westheimer selling a mass-produced cheaper version of the same style of guitar under the STRATOTONE Mark at a much lower price point than Agler’s custom STRATOTONE guitars, notwithstanding Agler’s prior exclusive rights in the STRATOTONE Mark. Agler spoke to Westheimer personnel twice at the NAMM show, notifying them that Westheimer’s products were infringing the STRATOTONE Mark. Agler was unable to sell any of his guitars at the 2010 NAMM show.

ANSWER: Defendant is presently without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 16 of the Complaint, and on that basis denies the same.

17. Since that time, Westheimer has flooded the market with lower quality, cheaper guitars that bear the STRATOTONE Mark. These inferior products retail between \$199.00 and

ANSWER: Defendant denies the allegations contained in Paragraph 17 of the Complaint.

18. On December 4, 2012 Westheimer filed Application Ser. No. 85/794,320 (the "320 Application") for the STRATOTONE Mark for use in association with "guitars" in International Class 15 pursuant to 15 U.S.C. §1051(a). In the '320 Application, Westheimer represented to the PTO that it had been using the STRATOTONE Mark in commerce since "00/00/2009" and that the STRATOTONE Mark was currently in use. A copy of the '320 Application is attached hereto as Exhibit D.

ANSWER: Defendant admits the allegations contained in Paragraph 18 of the Complaint.

19. On March 26, 2013, the PTO refused to register the '320 Application unless Westheimer submitted a claim of ownership with respect to Agler's '754 Registration. A copy of this refusal is attached hereto Exhibit E.

ANSWER: Defendant denies the allegations contained in Paragraph 19 of the Complaint. Defendant further avers that Exhibit E of the Complaint is a non-final office action issued by the USPTO, not a final refusal.

20. Westheimer could not provide the PTO with a claim of ownership for the '754 Registration because it did not own the '754 Registration.

ANSWER: Defendant admits that it did not own the fraudulently obtained '754 Registration..

21. On April 25, 2013, Westheimer filed a petition to cancel the '754 Registration (the "Cancellation Petition") with the Trademark Trial and Appeal Board. The Cancellation Petition is currently pending under cancellation proceeding no. 92057116.

ANSWER: Defendant admits the allegations contained in Paragraph 21 of the Complaint.

22. Westheimer is currently using the STRATOTONE Mark in commerce in association with guitars. A copy of a brochure featuring Westheimer's unauthorized use of the

ANSWER: Defendant admits that it is rightfully using the STRATOTONE Mark in commerce in association with guitars as its predecessors-in-interest have used the STRATOTONE Mark since in or around 1952.

COUNT I: FEDERAL UNFAIR COMPETITION
AND FALSE DESIGNATION OF ORIGIN

(15 U.S.C. § 1125(a))

23. Agler reincorporates and realleges paragraphs 1 through 22 as though fully set forth herein.

ANSWER: Defendant repeats and re-alleges its prior responses as if fully set forth at length.

24. Westheimer's use in commerce of the STRATOTONE Mark has caused and will continue to cause consumers to believe, contrary to fact, that the guitars it provides are sponsored, licensed and/or otherwise approved by, or are in some way connected to or affiliated with Agler.

ANSWER: Defendant denies the allegations contained in Paragraph 24 of the Complaint.

25. Westheimer's use in commerce of the STRATOTONE Mark already has and continues to cause mistake, deception, and consumer confusion.

ANSWER: Defendant denies the allegations contained in Paragraph 25 of the Complaint.

26. Westheimer's use of the STRATOTONE Mark is likely to cause initial interest confusion among the general public.

ANSWER: Defendant denies the allegations contained in Paragraph 26 of the Complaint.

27. Westheimer had actual and constructive knowledge of Agler's prior rights in the STRATOTONE Mark when it began using the STRATOTONE Mark in commerce.

ANSWER: Defendant denies the allegations contained in Paragraph 27 of the Complaint.

28. Westheimer had actual and constructive knowledge of the previously-existing '179 Application for the STRATOTONE Mark when it began using the STRATOTONE Mark in

ANSWER: Defendant denies the allegations contained in Paragraph 28 of the Complaint.

29. The foregoing actions of Westheimer constitute unfair competition and false designation of origin in violation of 15 U.S.C. § 1125(a), and, on information and belief, have been knowing, intentional, deliberate, willful, malicious, and in disregard of Agler's rights.

ANSWER: Defendant denies the allegations contained in Paragraph 29 of the Complaint.

30. Westheimer has unfairly profited from the actions alleged.

ANSWER: Defendant denies the allegations contained in Paragraph 30 of the Complaint.

31. By reason of foregoing knowing, intentional, deliberate, willful, and malicious actions, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate.

ANSWER: Defendant denies the allegations contained in Paragraph 31 of the Complaint.

32. Westheimer's activities have irreparably harmed and, if not enjoined, will continue to irreparably harm, the general public who has an interest in being free from confusion, mistake and deception.

ANSWER: Defendant denies the allegations contained in Paragraph 32 of the Complaint.

33. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate it for injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief pursuant to 15 U.S.C. § 1116.

ANSWER: Defendant denies the allegations contained in Paragraph 33 of the Complaint.

34. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts and pursuant to 15 U.S.C. § 1117, Agler is entitled to (i) Westheimer's profits; (ii) damages (and to have those damages trebled); and (iii) the costs of this action.

ANSWER: Defendant denies the allegations contained in Paragraph 34 of the Complaint.

under 15 U.S.C. § 1117.

ANSWER: Defendant denies the allegations contained in Paragraph 35 of the Complaint.

COUNT II: FEDERAL TRADEMARK INFRINGEMENT

(15 U.S.C. § 1114)

36. Agler reincorporates and realleges paragraphs 1 through 35 as though fully set forth herein.

ANSWER: Defendant repeats and re-alleges its prior responses as if fully set forth at length.

37. Westheimer's use in commerce of the STRATOTONE Mark already has and continues to cause mistake, deception, consumer confusion.

ANSWER: Defendant denies the allegations contained in Paragraph 37 of the Complaint.

38. Westheimer's use of the STRATOTONE Mark is likely to cause initial interest confusion among the general public.

ANSWER: Defendant denies the allegations contained in Paragraph 38 of the Complaint.

39. The above-described acts of Westheimer constitute trademark infringement in violation of 15 U.S.C. § 1114(1), and, on information and belief, have been knowing, intentional, deliberate, willful, malicious, and intended to cause confusion or mistake, or to deceive, and in disregard of Agler's rights.

ANSWER: Defendant denies the allegations contained in Paragraph 39 of the Complaint.

40. Westheimer has unfairly profited from the infringing actions alleged.

ANSWER: Defendant denies the allegations contained in Paragraph 40 of the Complaint.

41. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate.

42. Westheimer's willful and intentional activities have irreparably harmed and, if not enjoined, will continue to irreparably harm, Agler.

ANSWER: Defendant denies the allegations contained in Paragraph 24 of the Complaint.

43. Westheimer's willful and intentional activities have irreparably harmed and, if not enjoined, will continue to irreparably harm, the general public who has an interest in being free from confusion, mistake and deception.

ANSWER: Defendant denies the allegations contained in Paragraph 43 of the Complaint.

44. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

ANSWER: Defendant denies the allegations contained in Paragraph 44 of the Complaint.

45. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts and pursuant to 15 U.S.C. § 1117, Agler is entitled to (i) Westheimer's profits; (ii) damages (and to have those damages trebled); and (iii) the costs of this action.

ANSWER: Defendant denies the allegations contained in Paragraph 45 of the Complaint.

46. This is an exceptional case making Agler eligible for an award of attorneys' fees under 15 U.S.C. § 1117.

ANSWER: Defendant denies the allegations contained in Paragraph 46 of the Complaint.

COUNT III: FEDERAL TRADEMARK COUNTERFEITING

(15 U.S.C. § 1114)

47. Agler reincorporates and realleges paragraphs 1 through 46 as though fully set forth herein.

ANSWER: Defendant repeats and re-alleges its prior responses as if fully set forth at length.

48. Without authorization, Westheimer used and uses in commerce a spurious designation identical to the federally registered STRATOTONE Mark in connection with the sale, offering for sale, distribution, and advertising of guitars, which goods are covered by the '754 Registration.

ANSWER: Defendant denies the allegations contained in Paragraph 48 of the Complaint.

49. Westheimer's unauthorized use of the federally registered STRATOTONE Mark in connection with guitars has and will continue to cause consumers to believe that Westheimer's guitars originate from or are otherwise controlled by Agler and/or that Westheimer has Agler's authorization to use the federally registered STRATOTONE Mark in connection with guitars.

ANSWER: Defendant denies the allegations contained in Paragraph 49 of the Complaint.

50. Westheimer's unauthorized use of the federally registered STRATOTONE Mark in connection with guitars is likely to cause and has caused confusion, mistake, or deception, including as to the origin, connection or association of Agler with Westheimer's guitars.

ANSWER: Defendant denies the allegations contained in Paragraph 50 of the Complaint.

51. Westheimer's use of the federally registered STRATOTONE Mark in connection with guitars as described in this Complaint constitutes counterfeiting within the meaning of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

ANSWER: Defendant denies the allegations contained in Paragraph 51 of the Complaint.

52. Westheimer's acts are knowing, intentional, deliberate, willful, and malicious.

ANSWER: Defendant denies the allegations contained in Paragraph 52 of the Complaint.

53. By reason of the foregoing, Westheimer is liable to Agler for (a) statutory damages in an amount of up to \$2,000,000 for each counterfeited mark, as provided by 15 U.S.C. § 1117(c) of the Lanham Act, or, at Agler's election, an amount representing three (3) times Westheimer's illicit profits; and (b) reasonable attorneys' fees and pre-judgment interest pursuant to 15 U.S.C. §117(b).

**COUNT IV: COMMON LAW UNFAIR COMPETITION
AND TRADEMARK INFRINGEMENT**

54. Agler reincorporates and realleges paragraphs 1 through 53 as though fully set forth herein.

ANSWER: Defendant repeats and re-alleges its prior responses as if fully set forth at length.

55. Westheimer's use in commerce of the STRATOTONE Mark in connection with guitars is likely to cause consumer confusion or mistake to deceive as to the source of Westheimer's goods.

ANSWER: Defendant denies the allegations contained in Paragraph 55 of the Complaint.

56. Westheimer's conduct constitutes trademark infringement and unfair competition under the common law of the State of Indiana, entitling Agler to relief.

ANSWER: Defendant denies the allegations contained in Paragraph 56 of the Complaint.

57. Westheimer has unfairly profited from the actions alleged herein.

ANSWER: Defendant denies the allegations contained in Paragraph 57 of the Complaint.

58. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious actions described above, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate and has suffered irreparable harm.

ANSWER: Defendant denies the allegations contained in Paragraph 58 of the Complaint.

59. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

ANSWER: Defendant denies the allegations contained in Paragraph 59 of the Complaint.

COUNT V: UNJUST ENRICHMENT

60. Agler reincorporates and realleges paragraphs 1 through 59 as though fully set forth herein.

ANSWER: Defendant repeats and re-alleges its prior responses as it fully set forth at length.

61. At the expense of and detriment to and without the prior express or implied authorization of Agler, Westheimer has been unjustly enriched through Westheimer's knowing, intentional, deliberate, willful, and malicious use of the STRATOTONE Mark.

ANSWER: Defendant denies the allegations contained in Paragraph 61 of the Complaint.

62. By reason of Westheimer's actions described above, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate and has suffered irreparable harm.

ANSWER: Defendant denies the allegations contained in Paragraph 62 of the Complaint.

63. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

ANSWER: Defendant denies the allegations contained in Paragraph 63 of the Complaint.

COUNT VI: CONVERSION

(Ind. Code § 35-43-4-3)

64. Agler reincorporates and realleges paragraphs 1 through 63 as though fully set forth herein.

ANSWER: Defendant repeats and re-alleges its prior response as it fully set forth at length.

65. By engaging in the knowing, intentional, deliberate, willful, and malicious actions described above, Westheimer has exerted unauthorized control over the STRATOTONE Mark

ANSWER: Defendant denies the allegations contained in Paragraph 65 of the Complaint.

66. Westheimer has therefore committed conversion as defined under Ind. Code § 35-43-4-3.

ANSWER: Defendant denies the allegations contained in Paragraph 66 of the Complaint.

67. Westheimer's conversion of the STRATOTONE Mark has proximately caused Agler to suffer damages in an amount as yet to be ascertained but which continues to accrue and accumulate and irreparable harm.

ANSWER: Defendant denies the allegations contained in Paragraph 67 of the Complaint.

68. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

ANSWER: Defendant denies the allegations contained in Paragraph 68 of the Complaint.

COUNT VII: DECEPTION

(Ind. Code § 35-43-5-3(a)(6))

69. Agler reincorporates and realleges paragraphs 1 through 68 as though fully set forth herein.

ANSWER: Defendant repeats and re-alleges its prior responses as if fully set forth at length.

70. By engaging in the knowing, intentional, deliberate, willful, and malicious actions described above, Westheimer has disseminated to the public information that Westheimer knows is false, misleading, or deceptive, with the intent to promote Westheimer's business and/or commercial interests.

ANSWER: Defendant denies the allegations contained in Paragraph 70 of the Complaint.

71. Westheimer has therefore committed deception under I.C. § 35-43-5-3(a)(6).

ANSWER: Defendant denies the allegations contained in Paragraph 71 of the Complaint.

72. Westheimer's deception has proximately caused Agler to suffer damages in an amount as yet to be ascertained but which continues to accrue and accumulate and irreparable harm.

ANSWER: Defendant denies the allegations contained in Paragraph 72 of the Complaint.

73. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

ANSWER: Defendant denies the allegations contained in Paragraph 73 of the Complaint.

COUNT VIII: INDIANA CRIME VICTIM'S RELIEF ACT

74. Agler reincorporates and realleges paragraphs 1 through 73 as though fully set forth herein.

ANSWER: Defendant repeats and re-alleges its prior responses as if fully set forth at length.

75. Under the Indiana Crime Victims' Act (I.C. § 35-24-3-1), a person that suffers pecuniary loss as a result of the violation of I.C. § 35-43 *et seq.*, may bring a civil action against the person who caused the loss for treble damages, costs of the action, and reasonable attorneys' fees.

ANSWER: Defendant denies the allegations contained in Paragraph 75 of the Complaint.

76. Westheimer has violated Ind. Code. § 35-43 through knowing, intentional, deliberate, willful, and malicious commission of (i) conversion under Ind. Code § 35-43-4-3 and (ii) deception under Ind. Code. § 35-43-5-3.

ANSWER: Defendant denies the allegations contained in Paragraph 76 of the Complaint.

77. Agler is the victim of Westheimer's knowing, intentional, deliberate, willful, and malicious criminal actions, and, as a result, has suffered actual pecuniary damages in an amount as yet to be ascertained but which continue to accrue and accumulate.

ANSWER: Defendant denies the allegations contained in Paragraph 77 of the Complaint.

78. Agler is accordingly entitled to an award of those actual damages as well as statutory treble damages, corrective advertising damages, costs, and reasonable attorneys' fees.

ANSWER: Defendant denies the allegations contained in Paragraph 78 of the Complaint.

FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

79. The Complaint, or one or more counts set forth therein, fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE
(Invalidity of Trademark)

80. Agler's asserted trademark registration for the STRATOTONE Mark is invalid, or otherwise unenforceable.

THIRD AFFIRMATIVE DEFENSE
(Trademark Misuse)

81. Upon information and belief, Plaintiff's claims amount to trademark misuse.

FOURTH AFFIRMATIVE DEFENSE
(No Unfair Competition)

82. Defendant's acts do not amount to unfair competition, under statutory or common law, because Defendant did not represent its products as originating from Plaintiff and in no other way unfairly competed with Plaintiff.

FIFTH AFFIRMATIVE DEFENSE
(Innocent Infringement)

83. The claims made in the Complaint are barred, in whole or in part, because any infringement, if any, was innocent.

SIXTH AFFIRMATIVE DEFENSE
(Statutes of Limitations)

84. The claims made in the Complaint are barred, in whole or in part, by applicable statutes of limitations.

SEVENTH AFFIRMATIVE DEFENSE
(Laches)

85. The claims made in the Complaint are barred by laches, in that Plaintiff has unreasonably delayed efforts to enforce its rights, if any, despite its full awareness of Defendant's actions.

EIGHTH AFFIRMATIVE DEFENSE
(Waiver, Acquiescence, and Estoppel)

86. Each of the purported claims set forth in this Complaint is barred by the doctrines of waiver, acquiescence, and estoppel.

NINTH AFFIRMATIVE DEFENSE
(Fraud)

87. Upon information and belief, the claims made in the Complaint are barred, in whole or in part, by Plaintiff's actions which amounted to a fraud on the United States Patent & Trademark Office during the prosecution of the applications that matured into the registrations of the asserted mark.

TENTH AFFIRMATIVE DEFENSE
(Duplicative Claims)

88. Without admitting that the Complaint states a claim, any remedies are limited to the extent that the Complaint seeks an overlapping or duplicative recovery pursuant to the various claims against Defendant or others for any alleged single wrong.

ELEVENTH AFFIRMATIVE DEFENSE
(No Causation)

89. Plaintiff's claims against Defendant are barred because Plaintiff's damages, if any, were not caused by Defendant.

TWELFTH AFFIRMATIVE DEFENSE
(Failure to Mitigate)

90. The claims made in the Complaint are barred, in whole or in part, because of a failure to mitigate damages, if such damages exist.

THIRTEENTH AFFIRMATIVE DEFENSE
(Unclean Hands)

91. Upon information and belief, Plaintiff's claims are barred by the doctrine of unclean hands.

FOURTEENTH AFFIRMATIVE DEFENSE
(Lack of Irreparable Harm)

92. Plaintiff's claims for injunctive relief are barred because Plaintiff cannot show that it will suffer any irreparable harm from Defendant's actions.

FIFTEENTH AFFIRMATIVE DEFENSE
(Adequacy of Remedy at Law)

93. The alleged injury or damage suffered by Plaintiff, if any, would be adequately compensated by damages. Accordingly, Plaintiff has a complete and adequate remedy at law and is not entitled to seek equitable relief.

SIXTEENTH AFFIRMATIVE DEFENSE
(Superior Rights to the Trademark)

94. Defendant's use of the STRATOTONE Mark is not infringement because Defendant has superior rights over Plaintiff to use the mark exclusively.

ADDITIONAL DEFENSES

95. Defendant reserves the right to assert additional defenses based on information learned or obtained during discovery.

WHEREFORE, defendant, Westheimer Corporation, prays that the plaintiff, Darryl D. Agler, take nothing by way of his Complaint; that judgment be entered in favor of defendant and against the plaintiff; for the costs of this action; and for all other just and proper relief in the premises.

COUNTERCLAIMS

Counter-Plaintiff Westheimer Corporation (“Westheimer”), for its counterclaims against Counter-Defendant Darryl D. Agler (“Agler”), alleges as follows:

JURISDICTION AND VENUE

96. This is an action for trademark infringement under unfair competition and false designation of origin under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); and trademark infringement and unfair competition under Indiana state law.

97. This Court has original jurisdiction over Westheimer’s federal law claims pursuant to 28 U.S.C. §§ 1331 and 1338, and 15 U.S.C. § 1121.

98. This Court has supplemental jurisdiction pursuant to 28 U.S.C. §§ 1338(b) and 1367, with respect to Westheimer’ claims arising under the laws of the State of Indiana.

99. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because Agler is domiciled within this judicial district.

THE PARTIES

100. Westheimer is an Illinois corporation with a principal place of business at 3451 West Commercial Avenue, Northbrook, Illinois 60062.

101. Upon information and belief, Agler is an individual residing at 5506 Quail Canyon Circle, Fort Wayne, Indiana 46835, and does business as The Stratotone Guitar Co.

WESTHEIMER’S INTELLECTUAL PROPERTY

102. Since or before 1958, Westheimer has been a manufacturer, distributor and seller of musical instruments, including, but not limited to, guitars and bass guitars under a variety of brands, including, but not limited to HARMONY®.

103. The Harmony Company (“Harmony”) was founded in 1892 and produced stringed musical instruments.

104. In 1916, the Sears, Roebuck Company purchased Harmony.

105. From 1916 to the 1970's, Harmony sold hundreds of thousands of instruments annually.

106. In or around 1953, Harmony introduced the STRATOTONE model guitar.

107. The STRATOTONE model guitar featured an "Atom" logo on the headstock, consisting of electrons orbiting around a musical note (the "ATOM Mark").

108. Production of the STRATOTONE model guitar was suspended in the 1960's.

109. From 1976 through the 1990s, Harmony went through several ownership changes, while its products were continuously sold in the United States.

110. In the 1990's, Harmony guitars were sold almost exclusively through J.C. Penney.

111. In 2000, M.B.T. International announced it was reviving the HARMONY® line of guitars, including the STRATOTONE model.

112. In 2002, a new Harmony company was formed and displayed STRATOTONE model guitars at the 2002 Winter NAMM Show, the largest musical instrument trade show in North America.

113. In 2009, Westheimer purchased the Harmony brand and all its related intellectual property, including, but not limited to, the STRATOTONE and ATOM Marks.

AGLER'S UNLAWFUL CONDUCT

114. On March 7, 2006, despite Harmony's ownership and usage of the STRATOTONE Mark, Agler filed an intent to use application (App. Ser. No. 78/831,179) (the "'179 Application") with the USPTO for the STRATOTONE mark.

115. The '179 Application matured into U.S. Reg. No. 3,986,754.

116. Agler offers for sale guitars bearing the STRATOTONE and ATOM Marks (the "Infringing Goods"), infringing on Westheimer's common law trademarks.

117. As a result of Agler's continued infringement of the STRATOTONE and ATOM Marks, Westheimer has brought these counterclaims seeking the following relief:

**FIRST CLAIM FOR RELIEF
FALSE DESIGNATION OF ORIGIN AND
UNFAIR COMPETITION (15 U.S.C. § 1125(A))**

118. Westheimer hereby repeats and re-alleges, as if fully set forth herein, the allegations set forth in Paragraphs 96 through 117, above.

119. Agler has affixed, applied, or used in connection with the sale of Agler's Infringing Goods, false descriptions and representations, which tend falsely to describe or represent that the Infringing Goods offered by Agler are sponsored by, authorized by, or connected with Westheimer.

120. Upon information and belief, the activities of Agler complained of herein constitute willful and intentional uses, appropriations and infringements of Westheimer's STRATOTONE and ATOM Marks, with complete and deliberate disregard to Westheimer's rights. These activities were commenced and have continued in spite of Agler's knowledge that the use of the STRATOTONE and ATOM Marks was and is in direct contravention of Westheimer's rights, all in violation of 15 U.S.C. § 1125(a).

121. Westheimer has no adequate remedy at law, and is suffering irreparable harm and damage as a result of the acts of Agler as aforesaid in an amount thus far not determined.

122. Agler's foregoing unlawful actions have caused Westheimer irreparable harm for which Westheimer is entitled to permanent injunctive relief.

**SECOND CLAIM FOR RELIEF
COMMON-LAW TRADEMARK INFRINGEMENT**

123. Westheimer hereby repeats and realleges, as if fully set forth herein, the allegations set forth in Paragraphs 96 through 122, above.

124. As a result of Agler's wrongful conduct described above, the manufacturing, advertising, distributing and selling of Agler's Infringing Goods constitutes infringement of Westheimer's exclusive common-law rights, in that such use is likely to cause, and has caused

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confusion, deception and mistake in the minds of the public with respect to the origin, source and
affiliation of Agler's Infringing Goods.

125. Agler's Infringing Goods incorporate or use marks that are identical to
Westheimer's STRATOTONE and ATOM Marks, and have been and continue to violate and
infringe Westheimer common-law trademark rights. Agler's unlawful actions constitute common-
law trademark infringement under Indiana law.

126. Westheimer has no adequate remedy at law, and is suffering irreparable harm and
damage as a result of the acts of Agler as aforesaid in an amount thus far not determined.

127. Agler's foregoing unlawful actions have caused Westheimer irreparable harm for
which Westheimer is entitled to permanent injunctive relief.

THIRD CLAIM FOR RELIEF COMMON-LAW UNFAIR COMPETITION

128. Westheimer hereby repeats and re-alleges, as if fully set forth herein, the allegations
set forth in Paragraphs 96 through 127, above.

129. Agler's foregoing wrongful conduct constitutes unfair competition under the
common-law of the State of Indiana.

130. Westheimer has no adequate remedy at law, and is suffering irreparable harm and
damage as a result of the acts of Agler as aforesaid in an amount thus far not determined.

FOURTH CLAIM FOR RELIEF CANCELLATION OF U.S. REG. NO. 3,986,754

131. Westheimer hereby repeats and re-alleges, as if fully set forth herein, the allegations
set forth in Paragraphs 96 through 130, above.

132. Westheimer has superior rights in the trademark STRATOTONE, with
Westheimer's predecessors-in-interest's date of first use in 1953, sixty-three years before Agler
filed his intent to use application.

intent of deceiving the USPTO on a material issue in order to obtain a registration.

WHEREFORE, Counter-Plaintiffs seek judgment against Agler as follows:

- a. Cancellation of U.S. Registration No. 3,986,754.
- b. That Agler, its officers, agents, servants, employees and attorneys, and those in active concert or participation with Agler, be permanently enjoined and restrained from:
 - i. Using in any manner the STRATOTONE and ATOM Marks;
 - ii. Manufacturing, marketing, advertising, distributing or selling musical instruments bearing the STRATOTONE and ATOM Marks, including, without limitation, Agler's Infringing Goods;
 - iii. Representing, suggesting in any fashion to any third party, or performing any act which may give rise to the belief that Agler, or any of its goods, are authorized or sponsored by Westheimer;
 - iv. Passing off, or inducing or enabling others to sell or pass off, any goods as products produced by Westheimer; and
 - v. Otherwise competing unfairly with Westheimer in any manner.
- c. That Agler recall any and all goods from the market that infringe on the STRATOTONE and ATOM Marks.
- d. That Agler be ordered to deliver up to Westheimer for destruction, any and all goods in its possession, or under its control that infringe on the STRATOTONE and ATOM Marks.
- e. That Westheimer be awarded actual damages in an amount to be determined at trial for infringement of the STRATOTONE and ATOM Marks as provided by law.

- f. That Agler account for and pay over to Westheimer profits realized by Agler by reason of Agler's unlawful actions herein alleged; and
- g. that the Court impose whatever final equitable relief is necessary to achieve the foregoing, including, without limitation, the imposition of a constructive trust.
- h. That Westheimer be awarded reasonable attorneys' fees and costs, pursuant to 15 U.S.C. § 1117.
- i. Such other and further relief as is just and proper.
- j. A trial by jury as to all appropriate issues.

CARSON BOXBERGER LLP

By /s/Larry L. Barnard
Larry L. Barnard (11904-49)
Attorneys for Defendant

301 W. Jefferson Blvd, Suite 200
Fort Wayne, IN 46802
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CERTIFICATE OF SERVICE

This will certify that on the 27th day of May, 2014, a true and complete copy of the above and foregoing document was mailed to:

Louis T. Perry
Louis.perry@FaegreBD.com

Amie Peele Carter
Amie.peelcarter@FaegreBD.com

/s/ Larry L. Barnard